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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

Nos. 374 and 375

THE TIMES-PICAYUNE PUBLISHING COMPANY, *et al.*,
Appellants,
against
THE UNITED STATES OF AMERICA.

THE UNITED STATES OF AMERICA,
Appellant,
against
THE TIMES-PICAYUNE PUBLISHING COMPANY, *et al.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF ON BEHALF OF 98 NEWSPAPER PUBLISHERS AS *AMICI CURIAE.*

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February 20, 1953.

Pandick Press, Inc., 27 Thames St., New York 6, N. Y., U. S. A.

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BRIEF ON BEHALF OF 98 NEWSPAPER PUBLISHERS, *AMICI CURIAE.*

Preliminary Statement.

This brief *amici* is filed with the written consent of all parties to this case and is directed to the following issues:

Is a newspaper a monopoly—in the sense that a patent is a monopoly—merely because it is the only morning newspaper and has the largest circulation in its community—so that, without more, acts which would otherwise be normal business conduct become violations of the Sherman Act?

Is the sale of the same advertising by the same newspaper publisher in the morning and in the afternoon, the sale of two different "products"?

If so, are the two "products" so closely related that a refusal to accept such advertising, except upon a basis that includes an entire day's publication, is a lawful exercise of the rights of a sole trader—and not a tying that violates the Sherman Act?

Is it a violation of the Sherman Act for a newspaper publisher—acting as a sole trader—publishing both morning and afternoon editions, to require an advertiser to run his advertising in all editions on one day, where

—the same advertisement is run in the morning and the afternoon editions,

—both are printed upon the same presses,

—the so-called morning and afternoon editions are both mere departments and agencies of the same company,

—substantial economies result from printing the same advertisements in all editions,

—this enables the publisher to offer better and cheaper service in competition with other advertising media, such as newspapers published in other metropolitan areas, magazines, radio, television, etc.

The Interest of the *Amici Curiae*.

This brief *amici* is filed on behalf of 98 newspaper publishers, the names of whose papers appear at the end of this brief. They believe that the decision of the court below, if affirmed, will establish a precedent extremely harmful to them and dangerous to the newspapers of the country generally.

More than 180 newspaper publishers — substantially every publisher in the United States having a morning and afternoon edition or newspaper—sell some advertising

space on the basis of unit combination rates which are generally similar to the rates condemned by the court below.

The Government argues and the court below held, in effect, that a newspaper which is the only newspaper in its community in the morning field (or the evening field, as the case may be) is a "monopoly" which may be likened to the monopoly of a patent. The court did not hold that the morning Times-Picayune was an illegal monopoly, but it did hold that it was a practical monopoly, so that acts which would otherwise be normal business conduct become unlawful.

There were 1446 cities in the United States in which one or more daily newspapers were published in 1951. Less than 10% of these cities had two or more papers not under common ownership.* Even where two competing papers are published in the same community—one paper is almost invariably the largest in circulation and advertising. That was the situation in New Orleans and similar situations are common elsewhere.

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* According to the 1952 "Editor and Publisher Year Book", the English language newspaper industry consists of 1,773 daily newspapers published weekdays in 1,446 cities. Of the 1,773 dailies, 319 are morning newspapers and 1,454 are afternoon publications. Among them are at least 7 all day newspapers presumably included in the morning total.

In only 5 cities (or 9 cities if all day newspapers are counted as morning newspapers) there are two or more daily morning newspapers. 294 morning papers (92% of the total) constitute the only morning newspaper published in the city.

In 38 cities there are two or more daily afternoon papers. 1,371 afternoon papers (94% of the total) constitute the only afternoon newspaper published in the city.

Out of the list of 1,446 cities there are 111 cities in which there are both morning and afternoon newspapers not under common ownership and in the remaining 1,335 cities (92% of the total) there is only a single morning or a single afternoon newspaper, or both morning and afternoon newspapers are owned by the same publisher.

Consequently, under the Government's theory of the case, 90% of all the newspapers in the country are in some sense monopolies.

It is a matter of the deepest concern to practically every newspaper in the country to know whether it is to be treated—by reason of its mere existence—as a monopoly.

If the line of argument advanced by the Government is followed by this Court, then everything that these newspapers do may be deemed to be in violation of the Sherman Act.

If they increase the size of their plant, campaign for greater circulation, actively solicit additional advertising or extend their business in any way, they may be charged with progressively embracing each new business opportunity.*

Every piece of business secured by them, may be regarded as an "appreciable segment" of interstate commerce from which competitors have been "foreclosed".

The Government seeks to carry to an extreme conclusion general expressions in cases decided by this Court relating to a wholly different background. If this general language is now given the broad application for which the Government seems to contend, then almost every newspaper in the country is open to attack whenever any administration wishes to do so.

This does not involve merely questions of private interest. It involves a public interest of the gravest character.

It directly involves the question of the freedom of the press. Freedom of the press—constitutionally and practically—involves more than absence of direct censorship of what is printed.

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* *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 431 (2d Cir. 1945).

Freedom of the press requires a press that is bold and independent. No press can be bold and independent if at any moment it is subject to attack.

Wholly apart from the private rights of the newspaper as a sole trader—the public interest permits and requires the Court to refuse any such new extension of the law.

The Times-Picayune Publishing Company can speak with feeling on this subject because it was at one time itself the victim of an attempt by the State of Louisiana under the domination of the late Huey P. Long, to intimidate it and to silence its opposition under the color of a tax law. By a coincidence, this tax law imposed a tax on advertising based on circulation—but it was intended in fact to injure the Times-Picayune and certain other opposition newspapers in Louisiana.

These newspapers were saved by the interposition of this Court—enforcing the First Amendment—in the case of *Grosjean* v. *American Press Co.*, 297 U. S. 233.

The Decree.

The character of the relief granted—or to be granted—is also a matter of the deepest concern to the newspapers of the country.

The provisions of the decree entered by the court below are impossible to understand. If understood, they are impossible to comply with or to administer.

The additional provisions which the Government, by its appeal, asked to be included in the decree, are even more unworkable and drastic.

There is a contempt proceeding not only in every line, but in almost every word of the decree as entered and of the additions which are proposed by the Government.

We believe that this Court will agree that courts should not undertake the regulation of the rates to be charged by newspapers.

The Publishing Company and the unit rate.

The appellant, The Times-Picayune Publishing Company (hereinafter referred to as the Publishing Company) is a newspaper publisher in New Orleans. It publishes on week-day mornings under the name of The Times-Picayune, on weekday afternoons under the name of The New Orleans States, and on Sundays under the name of The New Orleans Times-Picayune—New Orleans States. All these editions are 100% owned and operated by the Publishing Company. They are printed on the same presses, and for practical purposes constitute one continuous operation. The relationship between them is well known, and openly avowed.

The New Orleans Item—(hereinafter referred to as the Item), is a newspaper which has also been published in New Orleans for over 30 years. It is called an afternoon paper—though it goes to press at 9:05 in the morning (R. 1536). Since March, 1950 it has also published a Sunday edition, called the Sunday Item.

The Publishing Company accepted certain kinds of advertising (national and classified) only upon a minimum basis of publication, i.e., that it should run in all its editions—both morning and afternoon—throughout a single day. This advertising practice is hereinafter referred to as the unit rate. It has been the practically universal practice among all newspapers similarly situated for many years.

The court below held that the unit rate violated the Sherman Act on the theory that the morning Times-

Picayune constituted a practical "monopoly" and that therefore the Publishing Company could not lawfully use the unit rate:—i.e., it could not sell only on the basis of publication for one complete day.

New Extension of Law.

This is not a case where this Court is compelled by any specific statute or decision to follow the line of argument for which the Government contends.

The present case—and the logical consequences of the Government's reasoning—would extend the interpretation of the Sherman Act far beyond anything heretofore decided.

All of the other cases where "tying" has been held to be illegal have involved either

a patent,

a copyright,

a conspiracy among separate companies amounting to a boycott,

a true monopoly achieved by illegal means,

a system of exclusive contracts, or

destruction or an attempt to destroy.

None of the Usual Indicia Is Present in This Case.

No Patent.

No Copyright.

No Conspiracy.

The Government abandoned the charge of conspiracy, and the court found none.

No Monopoly Achieved By Illegal Means.

The Government did not charge that the Publishing Company was in itself an illegal monopoly.

The court made no finding of illegal monopoly. It did, however, treat the Publishing Company *as though it were a monopoly* merely because its morning edition was the largest paper published in New Orleans, and the only paper available in the early morning.

Effective competition exists—from other newspapers and from other advertising media.

No Exclusive Contracts.

Nearly every case cited by the Government involved in some form a system of exclusive contracts.

There were no exclusive contracts here. Any advertiser was free to advertise in the Item or other advertising media, as well as in the Times-Picayune—States, and a very large proportion did so.

No Destruction and No Attempt to Destroy.

In *Lorain Journal Company* v. *United States*, 342 U. S. 143, the Court found that the defendant there had been guilty of "bold, relentless and predatory commercial behavior," and that the purpose and intent was "the complete destruction and elimination" of its competitor, in order to regain the monopoly which it had theretofore enjoyed.

No such purpose or result existed here. The purpose of the Publishing Company was to secure a more complete utilization of its plant and a more efficient operation. It did not seek to destroy or eliminate the Item. The Item was doing the largest business that it had ever done at

the time this suit was tried. It had not been destroyed or eliminated, and there was no reasonable probability that it would be destroyed or eliminated.

ARGUMENT.

I.

The unit rate did not constitute an attempt to monopolize or an unreasonable restraint of trade.

The court below found that the unit rate established by the Publishing Company resulted in

an unreasonable restraint of trade—Sherman Act, §1

an attempt to monopolize—Sherman Act, §2.

The segment of commerce alleged to have been affected was the afternoon "field" of newspaper advertising in the city of New Orleans.

The segment of commerce was still further narrowed to only two kinds of advertisements

classified advertisements

national advertisements.

While there may be technical differences between an attempt to monopolize and an unreasonable restraint of trade, it will simplify the argument to treat them, for the purposes of this case, as substantially the same thing. Any differences between the two charges—insofar as they may be relevant—will be dealt with at the point where these differences develop in the discussion of certain subordinate aspects of the case.

Not Illegal *per se*.

At the trial the Government moved for summary judgment on the ground that the unit rate was illegal *per se*.

The court held that this case did not present a *per se* situation. The Government did not appeal from that ruling. The case was then tried upon the theory that it was necessary for the Government to prove an unreasonable restraint of trade.

The court was right. The *per se* doctrine is a narrow one and should not be extended.

The Government relied strongly upon the language of patent cases such as *International Salt Co.* v. *United States*, 332 U. S. 392, 396, and the copyright cases such as *United States* v. *Paramount Pictures*, 334 U. S. 131, and *United States* v. *Griffith*, 334 U. S. 100, at 107. We shall have occasion to discuss these cases in detail later, *infra*, pp. 42-44 and 52 *et seq.* It is sufficient here to point out that they are applications of the well known doctrine that a patent or copyright is a monopoly granted by the Government, and that any attempt to broaden and extend the patent or copyright monopoly over other articles not covered by the patent or the copyright, is a violation of law.

In *United States* v. *Columbia Steel Company*, 334 U. S. 495, these same cases were cited by the Government for the purpose of extending the *per se* doctrine to the acquisition by the United States Steel Corporation of the Columbia Steel Company on the ground that such an acquisition automatically "foreclosed" their competitors in the steel industry from competing for the opportunity to supply the Columbia Steel Company with steel. This Court refused

to follow the language of those cases to its logical extreme and applied the rule of reason, saying:

> "Nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal *per se*" (p. 523).

In the recent case of *Standard Oil of California* v. *United States*, 337 U. S. 293, 307-308, this Court held that even a system of exclusive contracts or total requirement contracts (no such system exists in the present case) is not illegal *per se*, even under Section 3 of the Clayton Act, saying:

> "And so we could not dispose of this case merely by citing *International Salt Co.* v. *United States*, 332 U. S. 392."

As is well known, it takes less restraint to violate Section 3 of the Clayton Act than it does the Sherman Act. Although the Court found a violation of the Clayton Act, it expressly refrained from finding a violation of the Sherman Act.

In the case of *Prairie Farmer Pub. Co.* v. *Indiana, Farmers' Guide Pub. Co.*, 88 F. 2d 979 (7th Cir. 1937), cert. denied 301 U. S. 696; rehearing denied 302 U. S. 773, a group of independent farm newspapers offered combination rates which were lower than the sum of the separate rates. This was motivated by the legitimate main purpose of reducing the costs of the publishers themselves, and the costs to their advertisers. This combination rate was held not to be illegal—*per se* or otherwise.

Rule of Reason.

The Government, as usual, seeks to equate any restriction of competition with unreasonable restraint of trade—but the term "restraint of trade" is a term of art.

Not every restriction or diminution of competition rises to the dignity of a restraint of trade. Competition may be limited or restricted in many ways—as in the *Columbia Steel* case, 334 U. S. 495—without constituting a violation of the antitrust law. The rule of reason laid down in earlier cases* has not been discarded. It has been recognized and applied by this Court in so many recent cases that it is quite unnecessary to cite them.

The effect upon competition must be unreasonable; must be proved factually to be unreasonable. And the burden of proof is on the Government.

The Present Case Is a Case of First Impression.

This case goes beyond any case heretofore decided.

The cases cited by the Government will be discussed later in this brief—infra, p. 52 *et seq.*

At the risk of repetition we desire to point out again that the criteria which have been determinative in the cases cited and relied upon by the Government are not present here.

The Publishing Company acted as a sole trader. There was no combination or conspiracy. There were no patents or copyrights. There were no exclusive contracts. The advertisers were free to use any other papers also—and a majority of them used the competing Item (Ex. G-110B, R. 1456).

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* *Standard Oil Co.* v. *United States*, 221 U. S. 1.
United States v. *American Tobacco Company*, 221 U. S. 106.
Chicago Board of Trade Co. v. *United States*, 246 U. S. 231.
United States v. *Columbia Steel Co.*, 334 U. S. 495—footnote, p. 522.

Normal, Usual and Reasonable in the Opinion of the Industry.

It is natural to ask first how the unit rate is regarded in the industry.

The record shows that the unit rate involved in the present case is the normal and usual practice throughout the newspaper industry. It is almost universally employed by papers similarly situated.

At the time this suit was brought approximately 180 publishers—constituting the vast majority of the publishers having both a morning and afternoon paper—were using unit combination rates (Finding No. 26, R. 1258).

This had been a common practice for more than 40 years. The Item itself had followed this practice when it had both morning and afternoon editions.

It is clear that under the "custom of the merchants" this practice is normal and usual. It is regarded as fair and reasonable by high minded and honorable men.

Legitimate Main Purpose.

There are good and sensible business reasons from the standpoint of efficiency and better business management for a newspaper with morning and afternoon editions, to offer unit advertising rates.

Advertisements are tailor made. Once the advertisement has been set up in the type with illustrations, it costs very little to make additional imprints. As in the case of a book or a brief, subsequent copies can be run off with hardly any more expense than the cost of ink and paper.

The printing plant is expensive and its capacity to print is usually far in excess of the ordinary newspaper requirements.

Consequently, every publisher desires to keep his plant as fully occupied as possible. He can and does reduce his rates on additional reprints. It is normal and reasonable for a publisher to desire to sell his entire daily production as a unit. In other words, he wants to sell the space in his paper for an entire day.

Moreover, what the advertiser really buys is a group of readers. It is natural for the newspaper to desire to sell its entire group of readers as a unit.

Classified advertisements. These advertisements are short—often only two or three lines. They relate to such subjects as positions wanted, articles lost and found, etc. The Publishing Company handles as many as 2500 of these small advertisements every day—400 to the page.

They must be fitted into position on a page. They must be accurately printed. Lack of continuity in the publication of these items is very troublesome, confusing and expensive. Mistakes are destructive of good will.

The Publishing Company introduced a chart, which as reproduced in the record is over 7 feet long, illustrating the complexity of handling classified advertising—showing the 30 different steps that are involved in handling a single classified advertisement (Ex. D-21, R. 1642A).

Obviously, any newspaper would feel that its best interests from the standpoint of efficiency and of public relations, were furthered by unified action in all editions in handling this difficult kind of advertising.

All publishers realize this. The publisher has an interest in this situation which is just as legitimate and just as worthy of protection as the interest of the advertiser. The effect upon the public generally is completely *de minimis*.

National advertising. Here also, the Publishing Company had practical business motives for the establishment of the unit rate.

The costs of operation had been rapidly rising. Competition from other advertising media and from newspapers in other cities made it difficult to raise the rates for national advertising. The Publishing Company sought to meet this problem by a more complete and by a more efficient utilization of its plant.

A newspaper is in the business of selling readers. The unit rate enabled the Publishing Company to offer the advertisers more readers, without an equivalent increase in its advertising rates.

Effective Competition Exists.

No one familiar with the newspaper industry can doubt that effective competition—"workable" competition—exists.

No country has ever been so well informed, stimulated and subjected to advertising as the American people are today.

In 1951 over $6,496,500,000* was spent in advertising, and of that immense sum only about $2,257,700,000—34.7% was spent on newspaper advertising. The rest was spent on radio, television, magazines, farm publications, direct mail advertising, billboard advertising, and various other media.

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* Printers' Ink, August 8, 1952, page 35.

Competition Between Newspapers.

Competition exists between morning and afternoon papers. Even if the Publishing Company did not have the afternoon States, the morning Times-Picayune would still be competing with the afternoon Item for the advertiser's dollar. Every advertiser and every subscriber in the community is familiar with both papers—knows the quality of each—uses the one it thinks most suitable to its needs.

Every newspaper is in competition with the newspapers from other metropolitan areas. Transportation of newspapers is swift and inexpensive so that they circulate freely from one community to another.

The newspapers in New Orleans and elsewhere must compete for national advertising with papers serving other market areas. In planning an advertising campaign, advertisers do not distribute their advertising uniformly throughout the country or among the various advertising media. In selecting the cities in which they will place advertising and in deciding whether they will use newspapers as media in those cities, the rates offered by the various newspapers are an important factor.

However, other factors, such as the type of reader, editorial appeal, etc. are also influential so that as between two newspapers in the same community, the one with the lower milline* rate does not necessarily have the larger advertising lineage.

The competition is not between newspapers alone. The advertiser is buying the attention of the public. There are many other media engaged in selling the same thing.

The newspapers are in direct competition with all these other media.

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* The milline rate is the cost of one agate line, a column wide, appearing in 1,000,000 copies of a publication.

A very substantial number of national advertisers do not use the newspapers at all (R. 332).

Competition With Magazines.

There are many magazines which give excellent news summaries and commentaries. They have an enormous circulation. They are preferred as news sources and as advertising media by many people. It is only necessary to open any magazine to see how much more lavish and colorful the magazine advertising is as compared to the advertising in newspapers.

Nearly 7,000 magazines are published in the United States.* 3,500,000,000 copies of magazines are sold each year—10,000,000 copies a day.**

The total number of copies per issue of the 16 leading magazines in 1951 was over 48,700,000, exceeding the total number of families in the United States—44,646,434.†

The 251 leading magazines of the country have an average circulation of over 150,000,000—approximately equal to the total population of the United States.††

The amount of money spent in magazines exceeds the amount spent in the newspapers in the national advertising field.‡

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* N. W. Ayer & Sons, Directory of Newspapers and Periodicals (1951), p. 10.

** "Advertising at the Crossroads", p. 30.

† "Advertising at the Crossroads", p. 36; Standard Rate and data Service, *Consumer Magazine*, January, 1952, pp. 16-19.

†† "Advertising at the Crossroads", p. 37.

‡ Printers' Ink, January 30, 1953, p. 32.

Competition With Radio.

Radio is one of the most widely used of all advertising media.

The radio and the television news services outstrip the newspapers in speed of communication and often in the attractiveness of presentation. They offer innumerable differences in point of view and represent every shade of public opinion.

The fact that the radio and the newspapers are direct competitors in the advertising field is recognized by the decision of this Court itself in *Lorain Journal Co. v. United States*, 342 U. S. 143.

There are more radio broadcasting stations in the country then there are daily newspapers. There were 1773 daily newspapers in the country in 1951.* There were over 3000 authorized broadcast transmitting stations in the country in 1951. The number of authorized radio broadcasting stations has tripled since 1945.**

There were 16 such stations in New Orleans alone in 1951, and many others within hearing range of that city, though not located there.†

Moreover, every broadcasting station reaches a very wide area. Any receiving set will bring in a multiplicity of stations.

There are over 102,000,000 radio receiving sets in the country, one for every adult man and woman in the United States.††

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* "Editor and Publisher Year Book", 1952, p. 18. The number given by different authorities varies somewhat because of opinion differences as to what constitutes a newspaper.

** Federal Communications Commission Annual Report for Fiscal Year ended June 30, 1951, p. 128.

† *1952 Directory of AM and FM Broadcasting Stations*, Television Digest, January 1, 1952, p. 18.

†† Federal Communications Commission Annual Report for Fiscal Year ended June 30, 1951, p. 7.

Expenditures in 1951 for radio broadcasting advertising totaled $712,300,000.* Less than half of this sum was spent on network time. By far the greater amount went into local and spot advertising.**

Competition With Television.

Radio is already a major medium for advertising, both national and otherwise,—but even radio is rapidly being overshadowed by the phenomenal growth of the new medium—television.

Television has been operating commercially only a short time, but the number of television receiving sets in use has grown to approximately 20,000,000.†

This is particularly striking in view of the fact that the number of television broadcasting stations had been limited to 108 by a "freeze order" of the Federal Communications Commission. As of April 11, 1952, however, the Commission opened additional television channels to a total of 2053 commercial stations plus 242 additional channels for educational stations.†† This number of available television channels, like the number of radio channels, exceeds the total number of newspapers in the country.

Since the lifting of the freeze, over 1000 applications for new television stations had been filed by the end of 1952,‡ of

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* Printers' Ink, August 8, 1952, p. 35.

** "Advertising at the Crossroads," p. 47.

† "Broadcasting Telecasting", December 29, 1952, p. 47, quoting A. D. Plamondon, Jr., President of Radio Television Manufacturers Association.

†† "Advertising at the Crossroads", p. 52. Federal Communications Commission, "Sixth Report and Order", released April 14, 1952, as reported in Television Digest Supplement, pp. 165-166, shows 42 television channels allocated to Louisiana, including 7 to the City of New Orleans.

‡ Broadcasting Telecasting, January 26, 1953, p. 86.

which 220 stations had been authorized as of February 2, 1953 (in addition to the 108 already operating), the remainder still being in the course of processing.*

As soon as this vast increase in television transmitting stations has been completed, the number of television receiving sets will increase to a point of universal use.

Against this vast and increasing competitive threat—and particularly against the new giant, television—the newspapers are fighting a battle in which the new technology has revolutionized the competitive situation.

This is not mere ersatz competition. It is direct and deadly competition. All of these media are selling the same thing—the attention of the public.

Television transmits not only advertising and amusement, but also excellent news commentaries accompanied by televised newsreels—showing outstanding events almost as rapidly as they occur. These programs are received with avidity by the public. We need mention only the telecasting of the Senatorial hearings before the so-called Kefauver Committee—the coverage of the Presidential Conventions—and the Presidential Inauguration—to indicate their enormous influence and popularity.

Television is already a tremendous and increasing force in advertising. Even with the limited number of stations, expenditures in 1951 for television advertising totalled $388,400,000.**

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* Federal Communications Commission Release February 2, 1953, Public Notice 86230.

** Printers' Ink, August 8, 1952, p. 35.

Advertisers Shift Frequently Between Media.

The direct competition between these various media is shown by the fact that advertisers are continually shifting their accounts between these media. General Foods, for example, varied its newspaper advertising from $2,304,864 during 1936 to $341,999 during 1942, and to $4,291,249 during 1949.*

Effect of Competition on Advertising Rates.

The proof that effective competition exists lies in the fact that it has been impossible for newspapers generally to raise their advertising rates to keep pace with the rapidly mounting costs of labor, newsprint, other supplies, and all the other items that enter into the cost of producing the complex thing we call a newspaper.

The newspaper publisher knows very well that if he attempted to raise advertising rates proportionately, he would price himself out of the market. Similarly, it is impossible for a publisher to raise the price of his newspaper per copy without curtailing his circulation and consequently his advertising revenue. He is caught in a squeeze between inflation on the one hand and the competition of other papers and other advertising media and new technologies on the other.**

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* "How the Big 25 Advertised", Barbara Walker Lyndon, Printers' Ink (1951), pp. 28-52.

** Editor & Publisher, April 12, 1952, p. 7; April 5, 1952, p. 7; April 7, 1951, p. 5; July 1, 1950, p. 44; December 2, 1950, p. 5; Fortune, September 1951, "Newspaper Business," p. 118, also see quotations from Professor Nixon's article *infra*, pp. 23-24.

Modern Technology Has Completely Altered the Competitive Situation.

The Court should not refuse to see what everybody knows.

Judge Knox recognized such technological changes in the second phase of the *Aluminum* case, 91 F. Supp. 333 (S. D. N. Y. 1950). In that case he refused to grant divestiture of the plants of the Aluminum Company on the ground that effective competition existed, including competition from other materials, saying, page 416:

> "One must constantly remember that aluminum products are *in fierce rivalry with articles composed of other materials,* and which are manufactured and sold by concerns that, in size, are fully equal to Alcoa. Indeed, in some instances, the resources of such competing firms far exceed those of all three domestic aluminum producers.
>
> "If the aluminum industry is to develop fully, and be able to satisfy the tremendous demands to which, in the natural course of events, it will be subjected, it must not be reduced to a state of relative impotence.
>
> • • • • • • •
>
> At the present juncture, the weakening of any aluminum producer would lessen the buoyancy of the industry as a whole. Rightly or wrongly, from an economic and social standpoint, *big business in many industries is an actuality,* and if such enterprises are to be subjected to effective competition, *their trade rivals must be of somewhat comparable strength.*
>
> *"This situation imposes a minimum effective size on any aluminum producer if it be a real contributor to the growth of the industry, and be, as well, a lively competitor with the producers of other metals."*•

• Emphasis by italics is supplied in all quotations unless otherwise specified.

Even those writers who were formerly concerned by the existence of one-newspaper towns now recognize that the new technology has created effective, adequate and perhaps more than adequate, competition.

Professor Nixon* in his article on *"The Problem of Newspaper Monopoly"* in *"Mass Communications,"* published by the University of Illinois in 1949, said at page 160:

> "The decline of locally competing units in the newspaper business, as in other phases of American life, has been due to economic factors for which no single individual or group of individuals can be held responsible. In the newspaper business these factors include the loss of advertising revenue to radio, the demand of readers for more expensive services, the preference of advertisers for fewer media with larger circulations, and the rising cost of newsprint, ink, machinery, building, labor, taxes, and everything else that goes into the making of a newspaper. For many dailies it has been a case of 'death or consolidation,' even though the surviving paper or combination of papers usually has gained strength and stability through its inheritance of a non-competitive field."

and at page 165:

> "In my own cautious observations in 1945 about the possibility of economic regulation, I remarked that the new electronic media—television, FM, and facsimile—and the perfection of cheaper methods of printing might multiply local channels of opinion and advertising to such an extent that the cries of 'monopoly' would subside. That, of course, is exactly what is happening. As Vincent S. Jones,

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* Professor Raymond B. Nixon is the former head of the Department of Journalism at Emory University and a student and frequent comment[illegible] upon newspaper problems.

executive editor of the Utica (N. Y.) *Observer Dispatch* and *Daily Press* (another chain-combination!) told the teachers of journalism at Philadelphia, the various media are now about to enter upon 'the biggest, toughest, roughest, freest spending fight for a share of Mr. Average Reader's time that ever was dreamed up!' Consequently, the danger that 'monopoly' newspapers might bring regulation on themselves by unfair rate practices seems far more remote than it did in 1945."

and at page 166:

"4. *Competition from the new electronic media will increase.* The growing number of both AM and FM stations, together with the advent of television and facsimile newspapers, is filling the gap left by the 'disappearing dailies.' *This new competition* for the advertiser's dollar *will tend to hold newspaper advertising rates at a reasonable level* and thereby stave off any demand for regulation solely because of economic practices. *Even 'monopoly' publishers are having their troubles today in keeping revenue ahead of expenses, and readers and advertisers know it.*"

Chaffee,* in *"Government and Mass Communications,"* 650-3 (1947) recommended that the antitrust laws be only "sparingly" used. Professor Chaffee said, at page 653:

"When you look at the swirling human and material forces which bring about a broadcast or motion picture or one issue of a newspaper, the Sherman Act recedes. You stop expecting that a few lawyers in the Department of Justice and a

*Professor Zechariah Chaffee is a professor at Harvard Law School. He was a member of the Commission on Freedom of the Press, and his book "Government and Mass Communications" is the most comprehensive publication arising out of the studies of that commission.

> statute passed in 1890 can do much to make the press of 1950 what you desire."

Again on pages 618-624 he discusses the effect of breaking up "bigness" in the newspaper industry—and reaches the conclusion that "enforced competition through anti-trust decrees" will not result in "making the press give us what we want from it" either in "level of performance" or "diversification of views."

Local Monopoly in Newspaper Industry, 61 Yale Law Journal, 948 (1952), at 1005 says:

> "Although the government may broaden its recent actions, these thrusts cannot reach the dominant cause of local newspaper monopoly; competitive efficiencies of large circulation size. This fundamental economic circumstance, in fact, rules out traditional government measures of curbing monopoly power."

No Actual Monopolization.

The Government does not charge that the Publishing Company has actually "monopolized" the afternoon field.

The facts as to the continuing successful and profitable operation of the competing newspaper—the Item—as set forth below, show that any charges as to monopolization could not have been sustained.

No Dangerous Probability of Monopoly.

In order to constitute an attempt to monopolize the afternoon field within the meaning of the Sherman Act, the acts of the Publishing Company must have created at least a "dangerous probability" of monopoly.

It is perfectly apparent from the record in this case that there was no monopoly—and nothing approaching

monopoly—and no dangerous probability of monopoly—in the afternoon field in New Orleans. The situation during 1950—after the adoption by the Publishing Company of the unit rate for national advertising was as follows:

> The competing newspaper—the Item—had a larger circulation than the States (Ex. D-14, R. 1637-38).
>
> Its advertising lineage was at an all-time high, and was still increasing (R. 1225).
>
> Its circulation was also at an all-time high and increased by 5,000 during 1950 (R. 1229).
>
> The Item's national advertising during 1950 increased by 682,458 lines (including Sunday) (Ex. D-16, R. 1641; Ex. G-108 B, R. 1452) and its total advertising increased by 3,000,000 lines (R. 1224-25).
>
> The Item did twice as much local retail advertising (the bulk of all advertising) as the States.*
>
> 52.3% of all national advertisers in New Orleans newspapers advertised in the Item (Ex. G-110B, R. 1456).
>
> The Item also enjoyed 42% of the national advertising lineage in the afternoon field (Ex. G-108B, R. 1452).
>
> The Item's revenues—both from circulation and advertising—were greater than ever before.

There is no indication that the Publishing Company has ever had any desire to put it out of business, or to cause any appreciable injury.

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* Conceded by the Government in its trial brief in the court below, p. 25.

In fact, on two occasions in the past when earlier managements have tried to sell the Item to the Publishing Company, it refused to buy the Item on the specific ground that it did not want to be the only newspaper in New Orleans (R. 590, 610).

The fact that the Item has operated profitably for many years negatives completely any suggestion that there has been in New Orleans any dangerous tendency to monopoly.

In 1941 the Item was sold to a management which preceded the present management. The purchase price of the common stock was $400,000. For the fiscal years 1943 to 1949 inclusive the Item showed net profits before taxes averaging over $200,000 a year (R. 609).

In 1949 the purchaser resold the Item to the present management for $1,000,000, a gain of $600,000 over his purchase price (R. 609).

It is obvious that no dangerous probability of monopoly in the afternoon field exists.*

No Demonstrable, Substantial Effect Upon the Business of the Competing Item.

Mere Possibilities Not Enough.

The Publishing Company—as a sole trader—was acting entirely within its rights and in pursuit of a legitimate self-interest in offering to sell its advertising on a minimum

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* Total lineage of national advertising in New Orleans papers:

1949	8,006,955
1950	9,658,586

Percentage by Item of total:

1949	23.36%
1950	26.43%

(Ex. G-107 B, R. 1450, Ex. D-16, R. 1641.)

basis of a single day. This would be true even though it resulted in some indirect effect on the business of competitors. All competition affects competitors.

The purpose of the Sherman Act is to bring about competition. Nevertheless, if the unit rate is to be condemned because of a possible effect upon competitors, then that effect must not be merely theoretical or speculative or insubstantial.

The Sherman Act does not concern itself with mere possibilities. In this respect it differs from the Clayton Act and the Robinson-Patman Act which have a much lower threshold of violation. As this Court said in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522, footnote:

> "The general language of Section 1 and 2 of the Sherman Act has been construed as prohibiting only unreasonable restraints, not all possible restraints of trade. *Standard Oil* v. *United States*, 221 U. S. 1. In this it differs somewhat from the more specific language of the Clayton Act. 38 Stat. 730, or the Federal Trade Commission Act, 38 Stat. 717. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46, and *Standard Fashion Co.* v. *Magrene Houston Co.*, 258 U. S. 346, 357."

Thus, the Sherman Act requires some substantial, actual effect in order to rise to the dignity of a restraint of trade.

Laying aside the *per se* cases—and those cases where specific intent may sometimes convert minor acts into a dangerous probability, the Sherman Act requires that acts of competition must have substantial, actual effects in order to rise to the dignity of an attempt to monopolize or a restraint of trade.

A newspaper offers many kinds of advertising. Of these, only three kinds are referred to in the present record, namely, local, national and classified.

Of these, only two kinds—national and classified—were found by the court below to have been affected by any violation of the law.

Local Retail Advertising.

The local retail advertising is the bulk of all advertising. In lineage and in revenue it is greater than all other advertising put together.

All charges as to local retail advertising were withdrawn during the final argument of the Government's case, and the court made no finding of any illegality in that field.

The Publishing Company used an optional volume discount for local retail advertising. In one form or another, this discount had existed for many years.

There was nothing sinister about the adoption of this rate, and there had been no bad effect.

Indeed the Item did twice as much local display advertising as the States.

Classified Advertising.

At the outset it should be remembered that the Publishing Company did not start the unit rate on classified advertising. The Item itself started it nine years before the Publishing Company even had an afternoon edition, and the Item kept it for seventeen years.

No injury to the Item can be reasonably inferred from the mere fact that over this long period of years the classified advertising in the States has had a somewhat greater growth than the classified advertising in the Item.

Most of the change in the relative positions of the Item and the States in classified advertising took place when the

morning and afternoon papers of both companies were using unit rates (Ex. G. 106A, R. 1447).

It is impossible to say what factors may make one newspaper more attractive to advertisers than another. The gradual changes in the relative positions of the two companies over a long period of years, show no history of any sinister purpose, and no appreciable evidence of any causal relationship between those changes and the unit rate.

National Advertising.

During the year 1949 it became apparent that because of inflation and rising costs it was necessary for the Publishing Company to achieve a better balance of revenues and expenditures. It sought to accomplish this by a more complete utilization of its plant and by more efficient operation, rather than by increasing its rates. Accordingly its new rate card effective February 1, 1950 established a unit rate for national advertising covering both its morning edition (the Times-Picayune) and its afternoon edition (the States). This enabled it to offer to the advertisers a better coverage at a lower milline cost.

This was not a new or sinister method of meeting the pressure for greater efficiency. The Publishing Company was almost unique in not having previously adopted this method of operation. The newspaper industry had adopted it many years before.

It does not appear that the unit rate had any substantial effect whatever in shifting advertising from the Item to the Publishing Company.

The Government lays great stress upon the fact that the States received an increase in its volume of advertising. That was natural since the morning Times-Picayune was carrying more national advertising than the States.

The effect of the unit rate was to bring the States into line with the Times-Picayune. But there is no substantial evidence that this was the result of taking national advertising away from the Item. Each paper had its reader following and advertisers continued to use each to reach that following.

Including the national advertising in its Sunday edition, the total national advertising of the Item increased during 1950 by 682,458 lines—or about 36%. Its total advertising of all classes increased by 3,000,000 lines (R. 1224-1225).

What seems to have happened was that the new rate structure created an additional volume of business for the Publishing Company. But this was growth—not shift. There is no evidence that the States received anything of any significance that would otherwise have gone to the Item.

A detailed discussion of the evidence will be found in the Publishing Company's brief.

No Unreasonable Restraint of Advertisers.

The Government contends that—wholly apart from any effect upon the local competing paper, the Item—the unit rate unreasonably restrained the freedom of choice of the advertisers.

But the seller, as well as the buyer, has legitimate personal interests which he is entitled to protect. The rule of reason is not one sided. It balances the equities of both parties. Freedom of choice is not an absolute right. The boundaries of that freedom for the buyer must be determined with reference to a like freedom of choice for the seller.

We have already shown that the Publishing Company was protecting a legitimate self-interest when it installed the unit rate. That interest was the reduction of costs, more efficient operation, more effective competition against other competing media, the avoidance of rate increases and the more complete utilization of its plant.

Acting as a sole trader, it had a right to choose the manner in which it would meet these practical business problems and on what basis it would deal—at arm's length—with outsiders in selling its own product.

The Government says that this interfered with the freedom of choice of the advertiser to buy space in the Publishing Company's newspapers in any way the advertiser wished.

It is clear that there must be limits to any such right. The storekeeper is not obliged to let the buyer pick over his strawberries, even though he may be the only grocer in that area. He is entitled to sell eggs only by the dozen—and he is not obliged to let the buyer pick out all the largest eggs in the basket. The tailor can refuse to sell the coat without the pants.

So the newspaper can refuse to accept the same advertising copy, except in one piece, through all of one day's editions.

The advertisers have at their command the immense sum of $6,500,000,000 a year.* They can and do divide this at will between all the different media. They can pick and choose how this money is to be expended. They can and do shift at will among the various competing media.

* Printers' Ink, August 8, 1952, p. 35.

A substantial number of national advertisers did not use any newspaper advertising at all (R. 332).

The newspapers are fighting a difficult battle between increased costs on the one hand and rapidly mounting competition from all the other media for obtaining the attention of the public which modern technology has put in the advertisers' hands. The newspapers are having serious trouble in keeping revenues ahead of expenses—and the advertisers know it.

The bargaining position of the advertisers is so much superior to that of the newspapers, that the newspapers are the ones who need the protection. The situation is as simple as that.

The unit rate is general practice in the industry. It has been a commonplace for forty years.

No Specific Intent.

The Sherman Act is not like the Robinson-Patman Act, or the Clayton Act, which concern themselves with "possibilities".*

The Sherman Act is concerned only with the actual and substantial effects on competition and in the absence of such actual effects, no violation of the Sherman Act can be found without specific intent.

The Government in effect asked the court to decide this case on a *per se* basis, regardless of any substantial effect upon competition and regardless of intent. It gave mere lip service to the rule of reason, and asked the court to hold these acts unlawful upon theoretical considerations, with-

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* *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46; *United States* v. *Columbia Steel Co.*, 334 U. S. 495, footnote page 522.

out the necessity of showing that in fact any substantial injury had occurred, and regardless of specific intent. And that is in effect what the court did.

Many acts may affect competition which do not, in themselves, rise to the level of an attempt to monopolize or a restraint of trade.* This Court has many times pointed out that in such cases a specific intent is necessary to create a violation of the Sherman Act.

We believe that the law was correctly stated by Judge Learned Hand in his opinion in *United States* v. *Aluminum Company of America*, 148 F. 2d 416 (2d Cir. 1945)—when he said (p. 431-2):

> "conduct falling short of monopoly is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden. To make it so, the plaintiff must prove what in the criminal law is known as a 'specific intent,' an intent which goes beyond the mere intent to do the act."

We do not understand that the Court has ever overruled the frequently quoted analysis of the law on this subject as stated by Mr. Justice Holmes in the case of *Swift* v. *United States*, 196 U. S. 375, 396, 402, as follows:

> "Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly

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* Specific intent is "inferred" only when the effect is so substantial that specific intent is unnecessary.

United States v. *Columbia Steel Company*, 334 U. S. 495, 525;
United States v. *Paramount Pictures*, 334 U. S. 131;
United States v. *Griffith*, 334 U. S. 100, 105.

—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.

* * * * * * *

"Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree."

In the recent case of *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522, the Court said:

"A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of cases on restraints that are illegal *per se*."

There is nothing in the present case that even remotely resembles the "specific intent" that existed in the case of *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 150, where the Court said that—

"the publisher's conduct was aimed at a larger target—the complete destruction and elimination of WEOL."

Of course, every man intends to do what he does do when he actively competes. But that is not what this Court means when it says that specific intent is necessary to find

a man guilty of an attempt to monopolize. There is a difference between competing to get business and competing to "get" a competitor.

If he has attained a monopoly—or brought about results that are proximate to a monopoly—or are dangerously close to a monopoly, intent may be unnecessary.

Where monopoly—or serious actual restraint—are still remote, it takes a specific intent to turn the mere act of trying to get business into a violation of the Sherman Act.

II.

The application to newspapers of the principles advocated by the Government would constitute a dangerous extension of the Sherman Act.

The Government Theory.

This case goes beyond anything heretofore decided by this Court.

The Government theory—in brief—is

> that the morning and afternoon issues of a newspaper constitute separate and distinct "fields,"
>
> that even though the advertisements themselves are the same, morning advertising and afternoon advertising are different "products"—not identical or closely related products,
>
> that any newspaper which happens to be the only newspaper in the morning "field" has a "monopoly"—a "dominancy"—analogous to that of the owner of a government granted patent or copyright,
>
> if such a newspaper sells any advertising only on a unit basis in connection with its afternoon editions, then it is in continuous violation of the Sherman Act.

In this particular case the Government purports to rely upon the additional fact that the edition issued by the Publishing Company in the afternoon had a different format and to some extent different employees from the morning edition. From this they urge that the two editions were different "products"—and therefore that the same advertising copy printed in them, morning and afternoon, constituted two different "products".

But as we shall hereafter show, *infra*, p. 51, we think that in this respect the Government is making merely temporary use of a distinction which it regards as without real substance. The logic of its argument would carry it—on the next round of litigation in its creeping advance—into an attack upon any newspaper that uses a unit rate, even though all editions—both morning and afternoon—are published under the same name—provided that it is the only paper published in its community in either the morning or the afternoon "field."

The Newspaper Industry is a Peculiar Industry.

This case illustrates the danger of applying broad generalizations to special situations to which they cannot be appropriately applied.

The newspaper industry is a peculiar industry. It has gone through a period of transition in recent years. The standard of general education and intelligence has risen. The public has developed many interests which never formerly existed. The costs of production generally have enormously increased.

The result is that it is impossible to publish a newspaper of the type that the public demands and to which it is entitled—without a large circulation.

The publication of a newspaper today is an extremely complicated and expensive business undertaking. It requires the aid of world-wide news gathering agencies. Its services must include war news, the international news, the domestic news, the activities of the Government in Washington and elsewhere, and the news of the United Nations. It must also include women's pages, sports pages, book reviews, theatre, motion picture and television news and criticism, society pages, obituaries, radio and television programs, business and financial pages, feature stories, comic strips, crossword puzzles, pictures of current events, etc. etc.

These things are exceedingly expensive. It is impossible to maintain them without a large circulation. We may approve or deplore this evolution, but it is useless to resist it. That is what the public demands. It is impossible for newspaper publishers to fight against the trend.

Indeed we believe that the public interest in the end is better served by newspapers of this character because they give much more complete illumination and stimulate wider and wider interests among the readers.

This has brought about the result that in most communities the number of papers is limited.*

As previously shown, less than 10% of the communities in the United States have two or more papers not under common ownership.

Even where there are competing papers, almost invariably one paper enjoys a marked superiority in circulation

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* This is not merely argument of counsel. The cause of the decline in the number of newspapers throughout the count y has been extensively investigated by the Government itself. This Government investigation sets forth the same economic reasons for this decline that are stated above. The report is entitled, "Small Daily Papers under the Fair Labor Standards Act, U. S. Department of Labor, Wage and Hour Division, Economics Branch, June 1942". See especially, pp. 14-26.

See also quotations from Nixon, *supra*, pp. 23-24.

and in public esteem. And this would constitute "dominancy" as that word is used by the court below.

Ability of the highest order—amounting to a kind of genius—is necessary in order to judge correctly the wishes of the public in all the varied services that a modern newspaper includes. It involves an almost telepathic sense of public opinion and public taste, as well as great business ability. The factors which make one paper more sought after than another are impalpable, but a newspaper is the reflection of some outstanding man. In the end it is the public itself that makes the choice.

We do not believe that this choice by the public will be regarded by this Court as giving dominancy or monopoly power in a sinister or invidious sense.

Under the Government's theory, the Government would be free to prosecute at least 90% of the newspapers in this country under the antitrust laws.

It would do so on the theory that having no competition in their "fields" in their respective communities, they constitute by their very existence "monopolies." Consequently, if they solicit more advertising, improve their papers, add features or comics, campaign for circulation, or increase the size of their plant, they are expanding their monopoly, and are open to criminal prosecution.*

If that be the case, then freedom of the press is indeed at an end in the United States.

Newspapers—properly regarded—come within that class of cases which were described by Judge Hand in *United*

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* This is the logical conclusion from what Judge Learned Hand said about the Aluminum Company, whose position had been attained by normal growth, 148 F. 2d 416, p. 431:

> "It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. *Nothing compelled it to double and re-double its*

States v. *Aluminum Company of America*, 148 F. 2d 416, at 430, as follows:

> "A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although, the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster."

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capacity before others entered the field. It insists that it never excluded competitors; but *we can think of no more effective exclusion than to progressively embrace each new opportunity* as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections, and the elite of personnel. Only in case we interpret "exclusion" as limited to manœuvers not honestly industrial but actuated solely by a desire to prevent competition can such a course, indefatigably pursued, be deemed not 'exclusionary'."

Judge Knox in the second opinion in the *Aluminum* case, 91 F. Supp. 333, (S. D. N. Y. 1950), adopted a more realistic viewpoint. He avoided the destruction of the Aluminum Corporation by holding that it did not have the kind of monopoly and dominancy Judge Hand referred to.

Effective competition existed, both within the aluminum industry and from other industries as well. The Aluminum Company did not have "monopoly power"—or "dominancy"—i.e. the power to exclude others or to fix prices. This, despite the Aluminum Corporation's large percentage of the total production and its substantially lower costs.

And finally, under all the circumstances, he found that large and well integrated companies were essential from the standpoint of efficiency.

The public interest was involved and the public interest required the preservation of the Aluminum Company.

Effective Competition Exists.

We have already discussed in detail, *supra,* pp. 15-21, the fact that newspapers are under the constant pressure of effective competition.

This competition from other newspapers and other media is tremendous and effective. These other media, such as the radio, television, magazines and direct advertising through the mail, have been able, by the use of new technology, to put great and increasing competitive pressure upon the newspapers.

These other media are in the ascendant, and it would be a refusal to see what is obvious to everyone, to hold that any newspaper has either monopoly or dominancy.

The catch words on which the Government relies do not justify the decision for which the Government asks.

This is not a case for the mechanical application of rule of thumb standards.

The Government in this case is asking for an extreme and literal interpretation of certain general language—taken out of context—from certain opinions of this Court. This language was broader than the actual decisions themselves. We feel clear that these general expressions were not intended to be regarded as absolutes. They should not be carried to their utmost logical extreme without regard to the circumstances of each individual case.

These expressions, which have now become something in the nature of catch words, are "monopoly," "dominancy," "appreciable segment," "tying," "foreclosing competition" and "embracing each economic opportunity".

To treat these general expressions as absolutes, and to give them unlimited extension would do infinite harm to the very freedom of competition, which the Sherman Act was intended to secure. The Court itself in subsequent cases has recognized this, and has refused to carry these general expressions to their logical extreme.

The principal reliance of the Government in this case is the broad statement by this Court in the motion picture case, *United States* v. *Griffith*, 334 U. S. 100, 107, as follows:

> "It is indeed 'unreasonable, *per se*' to foreclose competitors from any substantial market. *International Salt Co.* v. *United States*, 232 U. S. 392, 396. The antitrust laws are as much violated by the prevention of competition as by its destruction. *United States* v. *Aluminum Co. of America, supra.* It follows, *a fortiori*, that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

The *Griffith* case is one of the group of motion picture cases. These cases are *sui generis*. In considering them, we must not forget that this Court had before it the whole background of interlacing relationships between producers and exhibitors, which bound the whole film industry into an almost watertight monopoly. That monopoly the Court was determined to break up.

In the *Griffith* case the Court was not dealing with a sole trader—but with three companies.

These three companies used their combined purchasing power to secure exclusive contracts for the showing of pictures—both first runs and second runs—over a large area including not only the towns in which they had the only theatre, but also towns in which they had competition.

The contracts themselves related to copyrighted films. In that case, therefore, we had many factors which did not exist in the present case, including in particular the factors of combination—of copyrights—of exclusive contracts—and of monopolistic rights achieved over a wide area.

In the *Griffith* case the Court at one point did use general language which might seem to refer to circumstances much narrower than the case which was then before it for decision, as follows:

> "*A man* with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic postion to acquire *exclusive privileges* in a city where he has competitors, he is employing a monopoly power as a trade weapon against his competitors. It may be a *feeble, negative weapon where he has only one closed or monopoly town.* But as those towns increase in numbers throughout a region, his monopoly power in them may be used with crushing effect upon competitors in other places" (p. 107).

Although the Court in this quotation did use the expression "a man"—nevertheless the *Griffith* case did not actually involve a sole trader but a conspiracy between a group of companies. It did not involve a single town—but a series of widespread purchasing agreements by which a monopoly of first run and second run pictures were secured in many towns.

The opinion of the Court in that case expressly recognized this by pointing out that the *Griffith* case was substantially the same as the *Crescent Amusement case*, saying:

> "In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, *a group of affiliated exhibitors, such as we have in the present case,* were found to have

violated §§ 1 and 2 of the Sherman Act *by the pooling of their buying power*, and the negotiation of *master agreements similar to those we have here*" (p. 104-5).

* * * * * * *

"* * * The appellees, having combined with each other and with the distributors to obtain those monopoly rights, *formed a conspiracy* in violation of §§ 1 and 2 of the Act" (p. 109).

The Times-Picayune case is not the first case in which attempts have been made before this Court to lift the language of the *Griffith* case out of its context—and to expand its application to cover practically any conceivable situation where competition is diminished in any degree, even though not unreasonably restrained.

In the *Columbia Steel* case, 334 U. S. 495, for example, the Government urged that the acquisition of the Columbia Steel Company by the United States Steel Corporation would "foreclose" the opportunity of other steel producers to sell to the Columbia Steel Company. The Government strongly relied upon this very language in the *Griffith* case, but this Court refused to give that language the literal interpretation that the Government asked for.*

In Standard Oil Company of California v. *United States*, 337 U. S. 293, a system of total requirement contracts was held to violate §3 of the Clayton Act. But this Court refused to go further and pass upon whether they also violated the Sherman Act. It is interesting to note that Mr. Justice Douglas, who wrote the opinion in the *Griffith* case, wrote a very strong and able dissenting opinion in the *Standard*

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* Similarly, in the second decision in the *Yellow Cab* case, 338 U. S. 338, this Court refused to apply the literal language of the *Griffith* case, to a case where joint ownership in a taxicab company had been acquired by other companies from whom it purchased supplies.

Oil case, to the effect that the tying contracts in that case were lawful. Thus, Mr. Justice Douglas himself recognized that his general language should not be given the extreme interpretation urged by the Government.

Despite his general language in the *Griffith* case, Mr. Justice Douglas strongly urged that the rule of reason be applied to hold the contracts in the *Standard Oil* case lawful, 337 U. S. 293, saying at pages 397-8:

> "Thus, even though the qualifying clause of §3 is appended without distinction of terms equally to the prohibition of tying clauses and of requirements contracts, pertinent considerations support, certainly as a matter of economic reasoning, varying standards as to each for the proof necessary to fulfill the conditions of that clause. If this distinction were accepted, various tests of the economic usefulness or restrictive effect of requirements contracts would become relevant. Among them would be evidence that competition has flourished despite use of the contracts, and under this test much of the evidence tendered by appellant in this case would be important."

The harmful consequences of Government theory.

We feel sure that this Court is not prepared to accept the consequences which would result from treating every newspaper which happens to be the only paper published in a particular town, in either the morning or afternoon field, as either

- an illegal monopoly or
- a practical monopoly which is subject to the same disabilities as an illegal monopoly.

As previously shown, less than 10% of the daily newspapers in the United States have daily competition from other newspapers published in the same community.

We feel sure that this Court is not prepared to hold that over 90% of all the daily newspapers in the country are "monopolies"—(practical or otherwise) or that they possess such "dominancy" that anything that they may do to secure business is illegal.

Such a holding would put newspapers in 1335 cities in a position similar to that condemned by Judge Hand in his opinion in the *Aluminum* case, 148 F. 2d 416 (2nd Cir. 1945) in which he said that it was illegal for the Aluminum Company to keep increasing its capacity and to "progressively embrace each new opportunity as it opened."

We feel sure that this Court is not prepared to condemn the newspaper industry to stagnancy or retrogression.

If 90% of the daily newspapers of the country are in such a position that they cannot increase their plant or seek additional circulation or improve their papers, or solicit more advertising without violating the law, then every one of those newspapers is living at the mercy of the prosecuting authorities.

We would have an *in terrorem* situation which would be completely incompatible with any real freedom of the press.

This Court is not forced by any ineluctable law or line of cases to reach any such dangerous conclusion.

All of the catch words which the Government uses are subject to the rule of reason.

They are also subject to the limitation that the interpretation of the Act must serve the public interest. Indeed, public interest is more important than the private interest. As Mr. Justice Holmes said in *Nash* v. *United States*, 229 U. S. 373, at 376:

> "* * * only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, *prejudice the public interest* by unduly restricting competition or unduly obstructing the course of trade."

The theory of the "appreciable segment of commerce" was not intended to atomize the industry of the United States. If so, every sole trader—even the smallest country store—who by reason of geographical location, happens to have the only business of its kind in a particular area, would be put in a strait jacket and deprived of all the normal and usual rights of sole traders generally.

Surely the Sherman Act was never intended to reach every situation in which a seller receives any economic advantage as a result of any local or temporary scarcity.

A seller's market may develop in any commodity at any time for a wide variety of reasons—strikes, scarcity of material, sudden or unforeseen increases in demand, etc. This is true in peace as well as in war. Shortages have arisen from time to time in many fields and will arise hereafter.

It would be expanding the interpretation of the Sherman Act to a new and very extreme degree if it should now be applied to every one-town-trader in every channel of distribution, and to every case where any trader for any reason has any kind of economic advantage.

Such an interpretation would extend the Sherman Act into an area of small business where the minutiae would be boundless.

To repeat, the newspaper industry is a peculiar industry. It falls directly within the language of Judge Learned Hand in the *Aluminum* case, where he said that (p. 430):

> "A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production, except by a plant large enough to supply the whole demand."

It would be a mistake to think that 90% of the newspapers in the country are monopolists, merely because they

happen to be the only paper published in their respective communities at a particular time of day. In the second opinion (91 F. Supp. 333) of the *Aluminum* case itself, Judge Knox, after testimony and further consideration, refused to alter the status of the Aluminum Company, saying, at pages 346, 416:

> "The conclusion is inescapable, from the *Columbia Steel* decision that the possession of *monopoly power* is something other than the status in a market of a dominant firm. The dominant firm may have neither the *power to exclude competitors nor the power to fix prices.*"
>
> • • • • • •
>
> "Rightly or wrongly, from an economic and social standpoint, big business in many industries is an actuality, and if such enterprises are to be subjected to effective competition, their trade rivals must be of somewhat comparable strength.
>
> "*This situation imposes a minimum effective size* on any aluminum producer if it be a real contributor to the growth of the industry, and be, as well, a lively competitor with the producers of other metals. Unless fully persuaded—as I am not—that a divestiture of Alcoa's properties should take place, I am most reluctant to attempt to tamper unnecessarily with economic and industrial forces from which the public has reaped substantial benefits, and from which, also, it can continue to be served, and without detriment, in my opinion, to the national welfare."

Thus even in the *Aluminum* case, the court wisely limited the extreme interpretation of the law on which the Government relies.

In the present case, as we have shown, the Times-Picayune does not have the power to exclude the Item. Nor has it ever had any intention of doing so. Neither does it have power to exclude any of the other competing media.

And finally—as already stated above, pp. 15-21—it would be wholly unrealistic to suppose that the Publishing Company was not faced with powerful and effective advertising competition. That was the very reason why the Publishing Company, in 1950, did not raise its advertising rates.

The identical advertising copy published in the morning and in the afternoon is either the same thing or two such closely related things that the publisher may reasonably treat them as a unit.

As previously shown, the identical advertising copy appearing in the morning and in the afternoon is either the same thing, or two such closely related things that the sale of them as a unit is an act which is normal, usual and in furtherance of a legitimate self-interest.*

The Government in the court below apparently was willing to concede—*pro hac vice*—that there would have been nothing illegal in the combination rate if the Times-Picayune and the States had been merely different editions of the same paper.

This is a tacit confession by the Government that it would be embarrassed to claim that a newspaper could not apply a unit rate to its own successive editions—even though such editions were issued continuously around the clock. We agree that such a claim would be a wholly unreasonable position for the Government to take.

We do not see any vital distinction, however, between that case and the present case. We believe that in the next stage of the Government's creeping advance, the Government will not attach any importance to that distinction.

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* See discussion *supra*, pp. 13, 14;
See also *Federal Trade Commission* v. *Gratz*, 253 U. S. 421.

Both the Times-Picayune and the States are mere agencies and departments of the same corporation. They are printed by the same plant using the same presses and the same linotype machines. They have the same officers, common bank accounts and the same purchasing facilities. Their national and classified advertising is printed and handled by the same advertising staff.

They do have different names. There is an attempt to give freshness to the afternoon edition by using additional features, comic strips and editorials—though the editorial policies of the two papers are the same. The two editions do have to some extent a different personnel—that would be inevitable even in successive editions of an around-the-clock paper. Human beings cannot work around the clock.

As for the name—when the Publishing Company bought the States, it really bought nothing but the name, good will and circulation. There is a momentum about names. It was natural to preserve that momentum by continuing the name to which the public had become accustomed. It is difficult to see how any real legal significance can be attached to such distinctions, even though representatives of the Publishing Company in selling talk to advertisers may have emphasized such matters on occasions.

Even where successive editions are published under the same name, no two editions are identical in character. The news content progresses as the day goes on. New material is fed into the press to give fresh interest—to appeal to different classes of subscribers—i.e., sports editions, financial editions, home editions, country editions and so forth—and thus to induce the public to buy the later editions. The paper that the husband reads at the breakfast table is not the same as the paper which the businessman or the sports lover reads on his way home at night.

Indeed the various editions often have their own distinctive names and even distinctive colors. Both the Publishing Company and the Item publish some of their editions with distinguishing colors—a peach colored edition and a green edition, respectively.

Metropolitan papers often have so-called "split editions" tailored to fit the interests of particular localities or suburbs.

If a man is to be persuaded to buy both morning and evening editions, the two editions must have a sufficiently different content to make him feel that the purchase is worthwhile—that he will not be bored by the same old stuff.

Nevertheless, the afternoon edition is a continuation of the morning edition. The paper flows out of the same presses—like a living river. New illumination is thrown upon the subject matter—new facets are presented. An around-the-clock paper is like a living organism. It constantly takes in new substance—and eliminates the old—and yet retains its real identity.

If the Government wins this case, we see no reason to suppose that it will be content to stop here. The same general language as to monopoly, dominancy, foreclosing and so forth, which it now urges to justify a decision against a unit rate for papers under different names would, at the next stage, be applied to such variations as—

> a paper in the morning "field" and in the afternoon "field" under the same name—
>
> successive editions within the same "field"—

If the Government wins this case, it will certainly cite the line of cases in which it has been so frequently repeated that the Sherman Act "is aimed at substance rather than form," and will argue that the principles established in this case are equally applicable—and should be mechanically applied—to around-the-clock newspapers.

III.

The cases cited by the Government are not in point.

The Motion Picture Cases.

The main reliance of the Government is the group of motion picture cases. These cases involve a factual situation so peculiar and unique that they cannot be regarded as controlling in cases having a different factual character.

The motion picture cases emerged out of a situation where substantially all of the motion picture producing companies and most of the exhibiting companies throughout the entire country were tied together by interlocking arrangements so complex that they were impossible to understand and so restrictive that it was practically impossible for outsiders to do business. This Court was determined to break up that impenetrable combination. The general language used in some of those cases must be considered against that background.

It is unrealistic for the Government to contend, as it seems to do, on the basis of a few sentences wrenched out of context, that the effect of these cases was

> to expand the *per se* doctrine to cover every act of successful competition;
>
> to abolish the rule of reason;
>
> to give an atomized interpretation to the Sherman Act, so that every possible diminution of competition, however small, is illegal;
>
> to treat every newspaper and every manufacturer and every local retailer as a monopolist if he happens to be the only one of his kind located in his community;
>
> to stretch the Sherman Act until it covers all the ground occupied by Section 3 of the Clayton Act, and Section 5 of the Federal Trade Commission Act

—both of which (it is well-settled) have much lower thresholds of violation than the Sherman Act—dealing with "possibilities" and not established facts.

This Court has repeatedly refused to give that general language any such revolutionary effect, although the Government has repeatedly asked it to do so.

It is true of all judicial decisions—but particularly true of antitrust decisions—that general language should be construed against the factual background in which it was uttered. No general language in any decision is intended to lay down absolutes.

The leading motion picture case is *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948). That case involved practically every form of Sherman Act violation rolled into one. There were combinations, conspiracies, systems of exclusive contracts, the illegal use of copyright monopolies, etc., etc., ending in a water-tight monopoly over-all. None of these factors is present in the Times-Picayune case.

The Government principally relies upon the *Paramount* case because it invalidated, among many other things, the system of block booking. But the scope of that ruling was very carefully delimited by this Court, when it said at page 159:

> *"All we hold to be illegal is a refusal to license one or more copyrights, unless another copyright is accepted."**

Conspiracy Cases.

The Times-Picayune case involves the acts of a sole trader.

It is well settled that the element of conspiracy creates a dangerous probability which does not exist in the case

* Before the copyright element had been injected into the block booking problem, block booking by a single producer had been held entirely lawful. *Federal Trade Commission* v. *Paramount-Famous-Lasky Corp.*, 57 F. 2d 152 (2nd Cir. 1932).

of a sole trader. Acts which would be entirely lawful if done by sole traders become unlawful when done by combinations and conspiracies.*

The other motion picture cases are all conspiracy cases. In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, this Court expressly placed its decision upon that ground, saying at page 183:

> "We may assume that if a single exhibitor launched such a plan of economic warfare he would not run afoul of the Sherman Act. *But the vice of this undertaking was the combination of several exhibitors in a plan of concerted action.*"

United States v. *Griffith*, 334 U. S. 100—was also a conspiracy case, although it contains language of a general character which taken literally might seem to refer to the act of a single exhibitor. This language has already been discussed in this brief (*supra*, pp. 42, 43), and we will not repeat that discussion here. We merely point out that the *Griffith* case itself pointed out that it was a case of a conspiracy, like the *Crescent* case, which it quoted and relied upon, saying at pages 104-105:

> "In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, *a group of affiliated exhibitors, such as we have in the present case*, were found to have violated §§ 1 and 2 of the Sherman Act *by the pooling of their buying power, and the negotiation of master agreements similar to those we have here.*"

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* *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565;
Federal Trade Comm. v. *Gratz*, 253 U. S. 421;
United States v. *Colgate & Co.*, 250 U. S. 300;
Grenada Lumber Co. v. *Mississippi*, 217 U. S. 433-4;
Eastern States Retail Lumber Dealers Association v. *United States*, 234 U. S. 600.

> "• • • The appellees having combined with each other and with the distributors to obtain those monopoly rights, *formed a conspiracy* in violation of §§ 1 and 2 of the Act" (p. 109).

The case of *United States* v. *General Motors Corp.*, 121 F. 2d 376, 397 (7th Cir., 1941), *cert. denied*, 314 U. S. 618, was another case of conspiracy, exclusive contracts and boycott.

There are no conspiracies, no exclusive contracts and no boycotts in the present case.

Patent Cases.

The Government relies upon the case of *International Salt Co.* v. *United States*, 332 U. S. 392. It is a typical case of an attempt to extend a Government-granted patent monopoly to cover unpatented material. It adds nothing to the long line of earlier cases, such as *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, on which it relied (332 U. S. at 395-6). Apparently the Government contends that the language used in the *International Salt* case at page 396—,

> "it is unreasonable *per se* to foreclose competitors from any substantial market"

was intended to enunciate a principle of general and all-inclusive application.

The Government apparently contends that this principle would apply broadly to all ordinary commodities and bring every sale involving minimum requirements of any character within the *per se* doctrine, thereby abolishing the rule of reason and the rights of a sole trader as well.

It is obvious from later decisions, such as *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495 and *Standard Oil Company of California* v. *United States*, 337 U. S. 293, that this Court had no such intention.

Clayton Act Section 3 Cases.

Standard Oil Company of California v. *United States*, 337 U. S. 293, is inapplicable here. The decision in that case was expressly limited to Section 3 of the Clayton Act, which, as is well known, was passed for the very purpose of reaching at their inception a special and limited type of contracts which were not unreasonable restraints of trade at common law.* The Court refused to go further and decide whether the facts involved a violation of the Sherman Act. And even in considering the Clayton Act, the Court said, page 307:

> "And so we could not dispose of this case merely by citing *International Salt Co.* v. *United States*, 332 U. S. 392."

Section 3 of the Clayton Act does not apply to newspaper advertising because newspaper advertising is not a "commodity".**

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* See *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, *United States* v. *Columbia Steel Co.*, 334 U. S. 495, footnote page 522, cf. also *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46, footnote.

** The Federal Trade Commission has taken the position that a sale of advertising space is not a sale of a "commodity" within the meaning of the Robinson-Patman Act. Informal opinions of FTC, 81 Cong. Rec. 8/25/37, CCH Trade Reg. Service, paragraph 2212, 127. See also, *Fleetway, Inc.* v. *Public Service Interstate Transportation Co.*, 72 F. 2d 761 (3rd Cir. 1934).

In *Paul* v. *Virginia*, 8 Wall. 168 (U. S. 1868), this Court said that insurance is not a commodity. The subsequent case of *United States* v. *Southeastern Underwriters*, 322 U. S. 533, did not overrule *Paul* v. *Virginia* on this point. It merely held that insurance, as now conducted, might nevertheless be part of the flow of interstate commerce under the Sherman Act.

Moreover, Section 3 of the Clayton Act applies only to sales upon condition that the purchaser will not deal with a competitor. There were no such conditions or exclusive contracts in the present case. Any advertiser was perfectly free to place advertising with the competing Item and 42.2% of the advertisers who dealt with the Publishing Company advertised in the competing Item also (Ex. G—110 B, R. 1456). Advertisers were also free to advertise in other competing media as well—and did so.

Consequently the Government did not charge any violation of the Clayton Act.

It should be noted also (as bearing upon the Government's attempt to give extreme interpretations to the language of Mr. Justice Douglas in the *Griffith* case and to the language of Mr. Justice Jackson in the *International Salt* case) that both of the these Justices (together with the Chief Justice and Mr. Justice Burton) dissented in the *Standard Oil* case, urging that the system of total requirement contracts in that case should have been held lawful.

The Lorain Journal Case.

Finally we come to the decision of this Court in *Lorain Journal Co.* v. *United States*, 342 U. S. 143. The Court did not have to rely upon the motion picture cases, the patent cases or the Clayton Act cases. That case involved the plain, old-fashioned doctrine that "bold, relentless and predatory commercial behaviour"—not aimed at the furtherance of the legitimate interests of the defendant, but "aimed at a larger target—the complete destruction and elimination" of a new competitor, a radio company—and accomplished by a system of exclusive contracts—amounting to an effective boycott—for the purpose of regaining

the 100% monopoly which the defendant had formerly enjoyed—constituted an attempt to monopolize.

That is a very different situation from anything that exists in the present case.

THE QUESTION OF RELIEF.

Practically all the newspaper publishers in the country which have morning and afternoon editions in any form, and other newspaper publishers as well, are deeply concerned over the type of relief granted.

While the decree is directly applicable only to the Publishing Company, it nevertheless sets a standard and precedent to which much of the industry may feel under obligation to conform. Consequently, the undersigned wish to be heard before such a standard is created.

I.

The decree as entered below.

The language of the decree

The decree entered by the court below is inappropriate, ambiguous and impossible to comply with.

The significant injunctions entered by the court below, read as follows:

"V

Defendant, The Times-Picayune Publishing Company, is enjoined and restrained from, directly or indirectly:

A. Offering to sell, contracting to sell, or selling advertising space in any newspaper published by it

only upon the condition, expressed or implied, that the purchaser of such space will contract for or purchase advertising space in any other newspaper published by it.

B. Refusing to contract to sell or refusing to sell advertising space separately in each newspaper published by said defendant.

C. Using the dominant position of the defendant, The Times-Picayune Publishing Company, in the morning field, to sell any newspaper advertising at rates lower than those approximating either (1) the cost of producing and selling such advertising or (2) comparable newspaper advertising rates in New Orleans;

PROVIDED that the rates for the sale of general, classified and local display newpaper advertising initially adopted by the defendant, The Times-Picayune Publishing Company, after this judgment becomes final, shall with due notice to the office of the Attorney General be presented by said defendant to this Court for approval under the terms of this Section V of this Final Judgment, and subsequent rate cards may thereafter be presented for approval."

The regulation of advertising rates is inappropriate.

Both the decree as entered and the additional amendments which the Government proposes, would require the court to undertake, from now on, to regulate the advertising rates of the Publishing Company.

We have found no decision of this Court which has permitted the regulation of prices of commodities in this extraordinary manner. For even stronger reasons, such regulations are wholly impossible and inappropriate when applied to newspaper advertising.

We earnestly urge that the words of Mr. Justice Brandeis in his dissenting opinion in *International News Service* v. *Associated Press*, 248 U. S. 215, 217—with respect to the undesirability of any attempt to regulate the business of news gathering by judicial action—are equally applicable to the regulation of advertising rates:

> "Courts are ill-equipped to make the investigations which should precede a determination of the * * * circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations."

"Using the dominant position of the defendant."

It is impossible to guess what effect would be given to this phrase, "using the dominant position of the defendant, The Times-Picayune Publishing Company, * * * to sell." It is true that the Times-Picayune is the largest paper in New Orleans and has the largest circulation. It cannot possibly detach itself from this characteristic in anything it does.

Obviously, the Government would take the position that any step whatever that the Publishing Company may take to secure advertising cannot be detached from the position which the Publishing Company has earned in the popular esteem. Against that background *every* advertising rate it publishes may be regarded as subject to the injunctive prohibitions of this paragraph.

The decree improperly regulates separate rates—not merely combination rates.

These injunctions do not merely apply to combination rates. Neither do they apply only to rates in the field which was allegedly restrained—namely, the afternoon field. They apply to *any* rates which the Publishing Company may offer separately or optionally in either paper, and, in any field.

Even assuming that a court should regulate combination rates (which we deny), there is no reason why it should attempt to regulate rates which apply to the morning field alone—or to the afternoon field alone.

The morning field alone has never been the subject of any suspicion of improper action. The Government has never even hinted that the rates in the morning field alone have been improper in any way. It is impossible to perceive any reason why a court should undertake to regulate them now.

Similarly, there has been no finding of illegality in connection with rates in the afternoon field alone. The sole basis of the decision below is the *combined* morning and evening rate. The whole reasoning of the court is addressed to such a *combination.*

The provisions of the decree regulating individual rates are not based on anything the Publishing Company has ever done or threatened to do—and should therefore be eliminated.

The rate standards are uncertain and impossible to comply with.

The positive prohibitions of paragraph C are two, namely, that the Publishing Company shall never sell any advertising in any newspaper at rates

"lower than those approximating" either

(1) the cost of producing and selling such advertising, or

(2) comparable newspaper advertising rates in New Orleans.

The syntax does not make it clear whether the Publishing Company will be safe if it complies with one of these two alternatives, or whether it must comply with both.

It would be impossible, as a practical matter, for the Publishing Company to comply with either for the following reasons.

Impossible to ascertain unit costs.

No cost accounting system has ever been devised by which the unit cost of any particular advertisement or class of advertisements can be computed.

A newspaper has two major divisions—circulation and advertising. Both are indispensable. Any allocation of cost between these two major divisions is purely arbitrary.

Similarly, the breakdown of costs and their allocation between different classes of advertising, or between different advertisements in the same general class, is necessarily arbitrary. Different classes of advertising have different rate structures. The broad classes are further divided into sub-classes. The rates for the different classes and sub-classes are set at wholly different levels—as the resultant of many different factors, competitive, historical, the impact of other media, and the bargaining power of the advertisers themselves, etc., etc. Does cost mean the specific cost of a particular advertisement, or the average cost, or the cost by classes and sub-classes?

Perpetual injunction against operating at a loss impracticable.

It is quite possible at any time that any newspaper—like any business—may be compelled to operate in the red. It cannot stop and liquidate merely because it is forced to carry on at a loss.

The volume of advertising fluctuates—with wide swings. In periods of prosperity the volume of advertising may be great. In periods of recession the volume sharply declines. Even from day to day or from season to season there may be fluctuations in the volume of advertising so that on a particular day or during slack periods of the year, the paper would not pay its own way. But the paper must be published every day—even though on certain days—or, for considerable periods, the advertising is so limited that the paper is published at a loss.

At the present moment the curve of cost is rising rapidly due to the increasing cost of labor and the increasing price of newsprint and other supplies. The rates for advertising have not kept pace with rising costs.* Any business recession would curtail advertising and might throw any newspaper into the red. Under such circumstances it would be impossible to prove that its advertising rates—whether all rates or some specific rates—were not below cost. In that event the Publishing Company would be enjoined from publishing any advertising at all.

The decree opens intimate financial data to inspection by competitors and customers.

The provision forbidding sales below cost would make it possible at any time for competitors, customers, or the Government to make matters of public record, all the most

* See citations, *supra*, p. 21.

intimate details of the operations of the Publishing Company. A complete audit and accounting could be demanded, which would show all sources of income, all costs of operation, the amounts of every different class of business (not only the one affected by a particular rate) and the allocation of costs between them, and the question of whether the Publishing Company is in a strong—or weak—financial condition.

Such disclosures would do harm to any business. The decree puts a weapon in the hands of disgruntled individuals to injure the Publishing Company at any time they choose.

Impossible to know what rates are "comparable".

The decree sets as a standard "comparable newspaper advertising rates in New Orleans." But what rates are to be compared?

There are two kinds of rates—agate line rates and milline rates.

The decree cannot mean the agate line rate, because the rate per line is based on circulation. The States, with its lower circulation, has to offer a lower agate line rate than the Item, just as the price for six eggs has to be lower than the price for a dozen.

On the other hand, the decree cannot mean that the Times-Picayune must raise its agate line rates so high that the resulting milline rate is not lower than the Item's milline rate. The milline rate is not a rate quoted by a newspaper; it is only a method of calculating the cost of publishing one agate line of advertising one million times.

The milline rate of a newspaper with a larger circulation is normally lower than that of a paper with a smaller circulation.

Once an advertisement has been set in print and locked in the frame, the cost of successive reprints diminishes

rapidly to a point where it reflects practically nothing but the cost of the paper and the ink. Consequently, an advertiser demands—and the publisher universally gives—a lower rate per copy for a large number of reprints than it gives for a small number. The advertiser demands and expects this lowered cost to be reflected in the milline rate. And the publisher is in the position where he can—and must—be willing to offer lower milline rates for a large number of copies.

Thus, while the morning Times-Picayune with its larger circulation will have a higher agate line rate than that of the Item, its agate line rate should result in a lower milline rate than that of the Item. Otherwise the Times-Picayune would be compelled to price itself right out of the national advertising market. Its competition is not primarily the afternoon Item, but rather all the other competing media.

The fact is that there are no "comparable" rates between newspapers.

Injunction prohibits competition.

If the injunction is construed to require the Publishing Company to comply with both of the prohibitions contained in paragraph C, the effect would be to prevent the Publishing Company from ever selling advertising at a lower rate than the Item. That means that no matter how much more efficient the Publishing Company may be, it could not pass on to the public its efficiency in the form of lower advertising rates. This is a completely unheard of remedy!

Instead of furthering competition, this injunction in effect prevents competition. It creates a restraint of trade which could not possibly be created by agreement between the papers.

Under the guise of preventing restraint of trade, this injunction creates restraint of trade.

The injunction is perpetual.

In most cases where unusual restraints have been imposed upon defendants in antitrust cases, the restraints have been limited to a reasonable period of time, such as three years.

In this case the prohibition of rates below cost or below the rates of competitors go on forever, regardless of changing circumstances.

A court should not undertake perpetual surveillance of rates.

The Government may argue that some of the uncertainty created by this injunction will be relieved because the Publishing Company is compelled in the first instance to submit its rates to the court for approval, and thereafter *may* submit its rates for approval. That means that every time the Publishing Company wants to make a rate change it may have to go to the court for approval. This would also involve opening its books for audit and inspection.

That would indeed put the court into the newspaper business. It would be undesirable from every standpoint.

Furthermore, while court rulings in each case might relieve against immediate uncertainty—they would not relieve against impossibility—or even against future uncertainty—now or in perpetuity hereafter.

On the other hand, the Government will undoubtedly contend that it can also call up any subsequent rate card for approval. In any event, the court has undertaken the duty of perpetual surveillance over the advertising rates of a newspaper. We do not think that any court should willingly accept the function of regulating the prices of any manufacturing corporation. *A fortiori*, we think it should not undertake regulating the advertising rates of newspapers.

II.

The Government's proposals for additions to the decree.

The text of the Government proposals.

The Government has appealed on the ground that the decree should contain also the following additional rate provisions. (R. 1275-76):

> "C. Entering into, adhering to or claiming any right under any contract, agreement, or understanding for the sale of advertising space in any single newspaper where such space is not sold in combination with advertising space in any other newspaper published by the defendants or any of them, the rate for which is based upon or determined by the volume of advertising space to be purchased or purchased in any other newspaper published by the defendants or any of them.
>
> D. Entering into adhering to or claiming any right under any contract, agreement, or understanding for the sale of advertising space in more than one newspaper published by the defendants or any of them, the combined rate for which is:
>
> 1. During a period of 3 years following the effective date of this final judgment, lower than the sum of the rates for the same amount of advertising space when purchased separately in each of the newspapers published by defendants or any of them which is included in the combined rate, or
>
> 2. After a period of 3 years following the effective date of this final judgment, lower than the sum of the rates for the same amount of advertising space when purchased separately in each of the newspapers published by the defendants or any of them which is included in the combined rate,

minus such amount as the defendants or any of them can show represents savings in costs to the publisher or publishers resulting from the production and sale of such advertising in combination."

The proposed prohibition of all optional volume discounts is unreasonable.

Paragraphs C and D of the Government proposals both in effect prohibit volume discounts where the morning and afternoon editions are involved.

Paragraph C does this by a flat prohibition of volume discounts based on space purchased in both editions.

Paragraph D prohibits combination rates which are lower than the sum of the separate rates for the two editions. This is merely another way of prohibiting volume discounts.

These are completely unreasonable provisions. Obviously, where both a morning and afternoon paper are published by the same company, in the same plant, there are economies and other practical benefits that are achieved by publishing the same identical advertising in both papers.

Moreover, where the same advertisement appears in repeated editions—as for example, in the morning and the afternoon—some advertisers feel that the value is diminished because there is a considerable overlapping in the morning and afternoon papers. The combination rate must reflect this.

Volume discounts are regarded as permissible in all the printing trades—and everywhere else.

There has been no history of any abuse of volume discounts in the present case. The Government did charge, originally, that the optional, combination volume discount granted by the Publishing Company on local retail advertising was improper. But the proof showed that the Item

enjoyed twice as much advertising of that character as the States, and the Government, on final argument, conceded that it had put in no evidence and knew of no evidence that those volume discounts were improper.*

Nevertheless, the Government now asks these very volume discounts—which it conceded were not illegal—should now be prohibited—not only in the field of local retail advertising—but in any field whatever.

Prohibition perpetual.

The prohibition against optional volume discounts would be unreasonable even on a temporary basis. But the injunction asked by the Government would last forever.

The requirement that optional volume discounts be allowed only to the extent of affirmatively proved cost savings is impossible and unreasonable.

After three years, Paragraph D does purport to allow an optional combination rate lower than the sum of the separate rates—but only when and only to the extent that the Publishing Company can prove that the difference is not greater than the saving in cost resulting from publication in both the morning and afternoon editions.

This permission is illusory, for two reasons:

Paragraph C would still prohibit volume discounts;

It puts a burden of proof upon the publisher with which he cannot comply.

The publisher, as an experienced business man, may know that material cost savings results. No cost account-

* Transcript of oral argument in District Court, p. 100.

ing system exists, however, by which he can sustain the burden of proving to any court just how much those savings are. No publisher uses one and none could be devised. Such proof would also require the newspaper publisher to submit all the most intimate financial details of his business in open court for audit and inspection.

Moreover—from the standpoint of the advertiser the advertising in both morning and afternoon may not be as valuable, proportionately, as advertising in either separately because of the partial duplication of readers. Many advertisers expect that factor to reduce the combination rate regardless of any saving in cost.

Judicial Legislation.

The Government's proposed additions to the decree constitute a permanent prohibition against volume discounts. The Government is asking the Court to write a new Robinson-Patman Act for special application to newspaper advertising. This—despite the fact that Congress itself did not include newspaper advertising within the scope of the Robinson-Patman Act.* Moreover, this pseudo Robinson-Patman Act would be even more drastic than the Robinson-Patman Act itself, and would omit the safeguards which that Act contains.

If newspaper advertising is to be regulated as proposed by the Government, such action should be taken by Congress. A legislative body alone can study the special problems involved and adapt the legislative prohibitions accordingly.

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* See footnote, page 56.

THE DECISION BELOW IS IN CONFLICT WITH THE PUBLIC POLICY OF FREEDOM OF THE PRESS.

Broad Scope of Government's Theory.

Over 90% of all the daily papers in the country—are the only newspapers published in their respective communities.

Practically all the publishers issuing papers both in the morning and in the afternoon—over 180 publishers—employ unit advertising rates generally similar to those involved in the present case.

Under the theory on which this case was decided, all of those newspapers would be treated *as though they were monopolies* in fact. They are to be regarded as constructive monopolies—practical monopolies—"as if" monopolies.

Under this theory everything that these practical monopolies do to improve their business, enlarge their plant, increase circulation, solicit advertising, etc. may be construed as extending their monopoly, "embracing new opportunities," "foreclosing competition," or reaping some "economic advantage."

If this is to be the law—make no mistake—this is the end of freedom of the press.

The newspapers ask true balance of public policies.

The newspapers are not to blame for the character of the newspaper industry. It is something they cannot help. It is the inevitable consequence of public demands and economic factors which the newspapers are powerless to resist. The cost of publishing a modern newspaper has become so great that the available circulation simply will not support

a multiplicity of papers in one community. Under the Government's theory, practically every newspaper in the country is at the mercy of the prosecuting officers.

We do not wish to be misunderstood. The newspapers are not claiming special privileges for their own benefit. They do not ask the Court to absolve them from a clear violation of the antitrust law. The Court in this case is being called upon to determine—for the first time—what are the proper boundaries of the antitrust law in a peripheral area.

The newspapers ask that in doing so, the Court take into consideration also the proper boundaries of another public policy—the public policy in favor of freedom of the press—which is at least as important to the public interest as the policy in favor of competition.

They ask for an interpretation which includes a realistic and sympathetic understanding of the peculiar nature of the newspaper industry, and the competitive impact of new technologies in other media.

They ask that in determining the boundary between these two conflicting public policies, the Court will consider not merely the interests of the advertisers or the protection of competitors from competition, but will seek a true balance of public policy in the public interest. The interest we refer to is the interest of the public itself—because of the indispensable function of a free press in a free society.

A free press serves on the one hand to interpret to the people the wishes of the Government. It serves on the other hand to interpret to the Government the wishes of the people. As said by this Court in *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250:

> "A free press stands as one of the great interpreters between the Government and the people. To allow it to be fettered is to fetter ourselves."

No freedom while in terrorem.

To be truly free—to perform its public function—the press must be both bold and fearless. Its duty is to inform, to debate and to illuminate. At times the performance of that function necessarily means unpleasant disclosures and courageous opposition.

But opposition is impossible where retaliation is instantly possible under the forms of law. It is entirely possible that a conscientious government would administer such powers with caution. But it would be naive to believe that public men having such power would never use it. Experience teaches that sooner or later men having power will use it—both directly and indirectly.

And any government which can control the press will be irresistibly tempted to do so.

It would be naive indeed not to realize that any newspaper will be intimidated—consciously or subconsciously—if it is subject at any moment to be prosecuted under the Sherman Act if it antagonizes those public officials who for the time being are in power.

The effect of the foregoing was summed up by Prof. Chafee* as follows:

> "Consequently, if the Antitrust Laws should be extensively applied to the communications industries, we can be sure that the party in power will determine through the Department of Justice whom to sue and what decrees to ask . . ."
>
> . . . . . .
>
> *"The Antitrust Laws are far more drastic in their potentialities than the sporadic prosecutions of eighteenth-century England."*

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* "Government and Mass Communications", Vol. II, pp. 669 and 674.

Not necessary to show abuse of power.

It is not necessary to show that a power over the press has actually been abused in order to show that the First Amendment has been violated—or its public policy impaired. The very existence of the power is sufficient. As said in *Thornhill* v. *Alabama*, 310 U. S. 88, at 97:

> "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."

The policy of the First Amendment requires that such encroachments be prevented in their very inception. As said in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 641:

> "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."

The policy of freedom of the press is not confined to direct control of what is printed.

Freedom of the press may be invaded in other ways than by the direct control of unlicensed printing, i.e., direct censorship of printed matter.

It may equally be invaded by much more subtle and insidious—but equally effective—means.

The old and narrow view that the First Amendment—and the policy which it embodies—prohibits only direct restrictions upon printing, has long since been abandoned by this Court.*

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* See for example the discussion in *Near* v. *Minnesota*, 283 U. S. 697, 714-715; 718-719; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248, 249.

See also Cooley, "Constitutional Limitations", 8th ed. p. 885.

Freedom of the press extends not merely to direct restriction of what the press shall print, but to the protection of every essential step in the whole process of collecting, printing and distributing the news.*

It has been held to forbid a discriminatory tax on newspaper advertising based on circulation. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250. One of the newspapers in that case was the same Times-Picayune that is a defendant here.

Freedom of the press is not something which is to be narrowly construed. It is entitled to the broadest possible construction. As this Court said in *Bridges* v. *California*, 314 U. S. 252, 263, the First Amendment is

> "a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Freedom of the press has disappeared in nearly all the countries of the world—and always under the plea that such a step is necessary to protect the "public interest."**

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* It prohibits interference with distribution of news. *Martin* v. *Struthers*, 319 U. S. 141, 143; *Lovell* v. *Griffin*, 303 U. S. 444, 452; *Schneider* v. *State*, 308 U. S. 147, 160; *Thornhill* v. *Alabama*, 310 U. S. 88, 102; *Sun Publishing Co.* v. *Walling*, 140 F. 2nd 445, 449-450 (6th Cir. 1944).

It prohibits punishment subsequent to publication. *Near* v. *Minnesota*, 283 U. S. 697, 713-723.

It even involves the right to remain silent as well as the right to speak. *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 634.

** As said by Mr. Chief Justice Stone in his dissenting opinion in *Minersville School District* v. *Gobitis*, 310 U. S. 586, at 604:

> "History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good. * * *"

Goebbels, when abolishing freedom of the press in Germany, purported to do so on the ground that he was in reality setting the press free—saying:

> "These shackles are now to be cut. The liberated [sic] press shall serve the state alone, its one and supreme boss!

In determining the question of the true public interest under the Sherman Act the court should also consider the public interest in freedom of the press.

Public interest in freedom of the press cuts across extreme extension of public interest in competition.

Concededly, this is a case of first impression.

The Court is called upon to mark new boundaries. It is not compelled by any ineluctable statute or decision to decide this case in favor of the Government.

As Mr. Justice Holmes once said, no principle is absolute to its logical extreme. After extending a certain distance, it is cut across and limited by other principles. *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355.

So here—this new and extreme extension of the principle of the Sherman Act is cut across and limited by the principle of freedom of the press.

The editors of all Germany are to be elevated to organs of the state, responsible only to the state, and no longer to the advertisers."

Herman Ullstein, "The Rise and Fall of the House of Ullstein", pp. 33-34.

In Argentina an attempt was made to control the freedom of the press under the guise of a requirement for the registration of editors. An editorial in La Prensa, resisting this regulation said:

"It is no secret for anyone what happened in Italy with the advent of the Fascist regime: the press lost its independence and soon was converted into an instrument of the totalitarian state."

* * * * * *

"Among us, besides having to inscribe in the register to exercise the profession, there is the obligation to renew every two years one's professional card with appeal, if renewal is denied, to a special tribunal, the majority of whom would be government functionaries.

"To ask permission to be free is to confess one's self a slave."

Editorial from La Prensa, Feb. 2, 1944, reprinted in The New York Times, February 23, 1944. See also "Defense of Freedom" by the Editors of La Prensa.

Freedom lost by gradual encroachments.

The loss of freedom never happens at once. It happens by imperceptible steps. Men lose their freedom by following the well known path of minor concessions.

There is a creeping advance. One petty aggression—one small restriction—follows another. No single step seems serious enough to fight about. But in the end a situation is reached where resistance is no longer possible.

The Government in power can always discover "violations" at will.

That was the history in Germany. It was the history in Italy. It was the history in Argentina. In greater or lesser degree it has been the history in almost every country of the world. One by one the lights have been dimmed or utterly extinguished. In all countries these results were accomplished under the color of existing laws.

The newspapers of this country in this case have watched what has happened in other countries. It is their business to do so. They fear—and rightly fear—anything that might prove to be the first step in the same direction here.

Indeed, the case in Louisiana above referred to,* involving this very defendant—The Times-Picayune Publishing Company—shows how easily it could happen here.

Recent history shows only too well the strength of those fundamental forces which tempt governments to the expansion of their power and facilitate their progress in that direction.

The power to control the press possesses an almost irresistible attraction—because it gives the power to control without the use of force—by conditioning the minds of the people.

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* *Grosjean* v. *American Press Co.*, 297 U. S. 233.

It is idle to say that it cannot happen here. We are but human. Anything that has happened so frequently to intelligent human beings elsewhere—can happen here or anywhere.

There is no immunity to the growth of power other than the continuous watchfulness which checks such growth at its inception.

It is not necessary to show actual violation of the First Amendment.

It is not necessary, for the purposes of this case, for the Court to hold that the interpretation of the Sherman Act which the Government has asked for would violate the First Amendment.

The First Amendment is more than a mere command to Congress not to cross certain rigid boundaries which mark the extreme limits to which Congress may go. It is also a declaration of national policy whose connotations embody all the history which lies behind it and which should serve as a guide not only to Congress but to the courts whenever questions of "policy" arise—long before the boundaries themselves are reached.

The Court is not faced with the necessity of determining whether such an interpretation would violate the Constitution. Wherever it is possible to interpret a statute in a manner that will avoid such a determination, it has always been the policy of the Court to do so.

The public policy which underlies the First Amendment is broader than the strict letter of its prohibitions.*

To apply a phrase once used by Mr. Justice Holmes, the policy of that amendment is so vital and far-reaching,

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* As said by this Court in *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245, the First Amendment

> "expresses one of those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"

that its positive prohibitions are surrounded by a "penumbra"* which is just as pervasive as the penumbra of policy that surrounds the Sherman Act.

Conclusion.

To repeat, the public policy which underlies the First Amendment is that, so far as is humanly possible, the press should be left free.

That freedom should not be curtailed by the expansion of the Sherman Act to extremes beyond which it has never gone before.

The Sherman Act should not now be given an interpretation which, in effect, puts every important newspaper in the country in a straight jacket—so that it cannot move—so that it cannot grow or improve—or even carry on its normal business.

It should not put every newspaper in the country in terrorem of prosecution by whatever administration is in power.

The decision should be reversed and the case dismissed.

Respectfully submitted,

JOHN T. CAHILL,
Attorney for the 98 newspaper publishers, *amici curiae*, whose papers are listed on the following pages.

CAHILL, GORDON, ZACHRY & REINDEL,
THURLOW M. GORDON
NEIL C. HEAD

WILSON W. WYATT,
HUBERT HICKAM,
Of Counsel.

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* Mr. Justice Holmes used this vivid and illuminating expression in his dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, 469, with respect to the Fourth and Fifth Amendments.

ALABAMA

Birmingham News

Montgomery Advertiser
Montgomery Journal

Mobile Register
Mobile Press

ARIZONA

Phoenix Republic
Phoenix Gazette

(Tucson) Arizona Daily Star
Tucson Daily Citizen

ARKANSAS

Eldorado News
Eldorado Times

Hot Springs Sentinel-Record
Hot Springs New Era

Texarkana Gazette
Texarkana News

CONNECTICUT

Bridgeport Telegram
Bridgeport Post

Meriden-Wallingford Record
Meriden-Wallingford Journal

The New London Day

Waterbury Republican
Waterbury American

FLORIDA

Daytona Beach Journal
Daytona Beach News

Orlando Morning Sentinel
Orlando Evening Star

Palm Beach Post
Palm Beach Times

Pensacola Journal
Pensacola News

GEORGIA

Atlanta Constitution
Atlanta Journal

Augusta Chronicle
Augusta Herald

Columbus Enquirer
Columbus Ledger

Macon Telegraph
Macon News

Savannah News
Savannah Press

IDAHO

Idaho Falls Post-Register

Boise, Idaho, Daily Statesman
Boise, Idaho, Evening Statesman

ILLINOIS

Decatur Herald
Decatur Review

INDIANA

Huntington Herald Press

Indianapolis Star
Indianapolis News

Muncie Star
Muncie Press

The South Bend Tribune

Terre Haute Star
Terre Haute Tribune

Vincennes Sun Commercial

IOWA

Des Moines Register
Des Moines Tribune

KANSAS

Topeka State Journal

KENTUCKY

Henderson Gleaner
Henderson Journal

The Lexington Herald
The Lexington Leader

Louisville Courier-Journal
Louisville Times

Owensboro Messenger
Owensboro Inquirer

LOUISIANA

Baton Rouge Morning Advocate
Baton Rouge State-Times

MASSACHUSETTS

Lawrence Eagle
Lawrence Tribune

Worcester Telegram
Worcester Gazette

MINNESOTA

Minneapolis Tribune
Minneapolis Star

MISSOURI

St. Joseph Gazette
St. Joseph News-Press

Springfield News
Springfield Leader & Press

MONTANA

Butte-Anaconda, Montana Standard
Butte-Anaconda Post

Great Falls Tribune
Great Falls Leader

Missoula Missoulian
Missoula Sentinel

NEW YORK

Elmira Advertiser
Elmira Star-Gazette

Gloversville-Johnstown Herald
Gloversville-Johnstown Leader-Republican

Hudson Daily Star
Hudson Evening Register

Newburgh News
Newburgh Beacon News

Rochester Democrat & Chronicle
Rochester Times-Union

Troy Record
Troy Times-Record

Utica Press
Utica Observer-Dispatch

NORTH CAROLINA

Asheville Citizen
Asheville Times

Wilmington Morning Star
The Wilmington News

Winston-Salem Journal
Winston-Salem Twin City Sentinel

OHIO

Dayton Journal Herald
The Dayton Daily News

Springfield Sun
Springfield News

Zanesville Times-Recorder
Zanesville Signal

OKLAHOMA

Muskogee Phoenix
Muskogee Democrat

Tulsa World
Tulsa Tribune

PENNSYLVANIA

Lancaster Intelligencer Journal
Lancaster New Era

Meadville Tribune-Republican
Meadville Republican

SOUTH CAROLINA

Charleston News & Courier
Charleston Post

Columbia State
Columbia Record

Spartanburg Herald
Spartanburg Journal

TENNESSEE

Johnson City Press Chronicle

TEXAS

Amarillo Daily News
Amarillo Globe-Times

Austin American
Austin Statesman

Beaumont Enterprise
Beaumont Journal

The Galveston Daily News
Galveston Tribune

Lubbock Morning Avalanche
Lubbock Evening Journal

Waco News-Tribune
Waco Times-Herald

VIRGINIA

Bristol Herald-Courier
Bristol Virginia-Tennessean

Lynchburg News
Lynchburg Advance

Newport News Press
Newport News Times-Herald

Norfolk Virginian-Pilot
Norfolk Ledger-Dispatch

Richmond Times Dispatch
Richmond News Leader

The Roanoke Times
The Roanoke World News

Staunton News-Leader
Staunton Leader

WASHINGTON

Spokane Spokesman-Review
Spokane Daily Chronicle

Walla Walla Union Bulletin

Yakima Herald
Yakima Republic

WEST VIRGINIA

Beckley Post-Herald
(Beckley) Raleigh Register

Bluefield Daily Telegraph
Bluefield Sunset News

Fairmont Times
Fairmont West Virginian

Huntington Herald Dispatch
Huntington Advertiser

Parkersburg News
Parkersburg Sentinel

Wheeling Intelligencer
Wheeling News-Register